No. 82-901

IN THE

Supreme Court of the United States

LEON W. KNIGHT, *et al.*,

Appellants,

v.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*

Appellees.

MOTION TO AFFIRM OF APPELLEE LABOR ORGANIZATIONS

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Appellee Labor Organizations,[1] pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to affirm those portions of the judgment of the United States District Court for the District of Minnesota appealed from by appellants. Said motion is based on the fact that the questions presented by appellants are so insubstantial as not to warrant further argument.

[1] The term "appellee labor organizations" shall be used to refer to the Minnesota Community College Faculty Association, the Minnesota Education Association, the National Education Association, the Independent Minnesota Political Action Committee for Education, and the past and present officials and staff identified in appellants' Jurisdictional Statement at i-ii, notes 2, 3 and 4.

STATEMENT

This is a direct appeal from the Memorandum Order and Opinion of a district court of three judges constituted pursuant to 28 U.S.C. § 2281 which was issued March 31, 1982, and reaffirmed by a denial of appellants' motion for rehearing on August 13, 1982. Appellants initiated this action to challenge the constitutionality of certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. 179.61-179.76 (1980), and the constitutional ability of appellee Minnesota Community College Faculty Association (hereinafter "MCCFA") to act as the exclusive bargaining representative of community college instructors employed by co-appellee State Board for Community Colleges (hereinafter "State Board").

PELRA establishes a comprehensive framework for collective bargaining by public employees in the State of Minnesota. It provides for the democratic selection by public employees in an appropriate bargaining unit of an exclusive bargaining representative. Minn. Stat. 179.67, Appendix at A-122.[2] The exclusive bargaining representative has the exclusive right and duty to meet and negotiate concerning the terms and conditions of employment with the public employer of the employees it represents. Minn. Stat. 179.65, subds. 1, 2, 4; 179.66, subd. 2, Appendix at A-117-127. The duty to meet and negotiate under PELRA "means the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible in advance of the budget making process, with the good faith intent of entering into

[2] All references to the Appendix herein are to the Appendix To Jurisdictional Statement submitted by the appellants.

an agreement with respect to terms and conditions of employment; *provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession.*" Minn. Stat. 179.63, subd. 16, Appendix at A-112 (emphasis supplied).

Appellants are instructors in certain Minnesota community colleges who are within a state-wide bargaining unit consisting of all instructors employed by the appellee State Board. Appellee State Board is an agency of the State of Minnesota responsible for the management and control of the state's community colleges. Appellee MCCFA is certified as the exclusive representative of the instructors' bargaining unit, and has met and negotiated several successive collective bargaining agreements with the State Board. The Minnesota State Legislature has reserved the right, in PELRA, to accept or reject such agreements. Minn. Stat. 179.74, subd. 5, Appendix at A-143. As noted by the lower court in its decision, the legislature has in the past exercised this prerogative by modifying contract terms. Memorandum Opinion and Order, Appendix at A-6.

The MCCFA is affiliated with appellees Minnesota Education Association ("MEA") and National Education Association ("NEA"). The latter two organizations are, respectively, state-wide and national voluntary associations of teachers. Under an affiliation agreement among the three organizations, MCCFA members pay "unified dues" to the MCCFA, MEA and NEA. The dedication of a portion of such dues to MEA and NEA is in exchange for staff, office and other assistance to MCCFA. Findings of Fact, Appendix at A-36.

Appellee Independent Minnesota Political Action Committee for Education ("IMPACE") is a voluntary, non-profit committee of individual educators. It is a political action

committee which receives contributions of money, and distributes that money to candidates for political office. While its Board of Directors is appointed by the MEA Board of Directors, it has sole authority over its funding decisions and other activity. Findings of Fact, Appendix at A-37.

The lower court found that all of the appellee labor organizations are independent and "are not and do not function or operate . . . as a single integrated unit." Findings of Fact, Appendix at A-40. In describing the activities of the MCCFA, the lower court stated that "nearly all activities relate directly to collective bargaining, formulation of a bargaining position, contract administration or closely related organizational and professional growth." Findings of Fact, Appendix at A-40. The court found a similarly substantial commitment to collective bargaining related activities on the part of the MEA and NEA. Findings of Fact, Appendix at A-41.

Appellants are not required and have decided not to join the MCCFA. All persons within a bargaining unit who elect not to join the exclusive representative, such as appellants, may be required to pay a "fair share"—*i.e.*, agency shop—fee to the exclusive representative. By statute the amount of the fee is "an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues." Minn. Stat. 170.65, subd. 2, Appendix at A-118.

Appellants initiated this suit alleging that their right of free association under the First and Fourteenth Amendments to the United States Constitution is abridged because of the MCCFA's role as their exclusive representative under PELRA. Recently, appellants have asserted in addition that

PELRA results in a constitutionally impermissible delegation of legislative power to the MCCFA. Appellants do not challenge the amount of the fair share fee assessed by the MCCFA.

ARGUMENT

A. Appellants' Argument That PELRA Unconstitutionally Delegates Legislative Power is Without Merit.

The appellants' argument of unconstitutional delegation is contradicted by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Appellants claim that the ability of an exclusive representative to meet and negotiate with a public employer delegates to the MCCFA a "legislative power to make public policies." Appellants' Jurisdictional Statement at i. There are numerous flaws and inconsistencies with appellants' argument, but the most obvious is that it ignores *Abood* and its affirmation of the principle of exclusive representation. In *Abood*, this Court ruled that an exclusive bargaining representative could constitutionally assess a fee against nonmembers whom it represented in collective bargaining, so long as that compulsory fee is not used for ideological purposes unrelated to collective bargaining. The Court discussed the principle of exclusive representation approvingly, stating that it

> avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents interunion rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the pos-

> sibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

431 U.S. at 220-221 (citations omitted). The *Abood* decision rests squarely on previous decisions of this Court upholding the constitutionality of agency shop fees charged by private sector unions. *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956).

Appellants forward numerous attempts to distinguish *Abood*, most of which amount to assertions that the Court did not mean what it said, or what it held. The assessment of an agency shop fee has as its fundamental underpinning the principle of exclusive representation. It is the activity of the representative on behalf of the bargaining unit employee who has not joined the representative which justifies the fee. In upholding the constitutionality of an agency shop fee in *Abood*, this Court necessarily approved the structure of exclusive representation underlying that fee. As the above quoted language from *Abood* demonstrates, the Court did so knowingly.

More fundamentally, and dispositive of this case, appellants have failed to establish that collective bargaining amounts to a delegation of legislative power. The MCCFA does not have the authority to establish "economic laws." It may only bargain with the public employer; *the public employer is not required to agree to any particular proposal, or to make a concession.* Minn. Stat. 179.63, subd. 16, Appendix at A-112. The only "economic laws" (if that label be applied to a collective bargaining agreement) which result from this process

are those negotiated terms to which the public employer agrees.

Appellants offer no persuasive precedent for the proposition that collective bargaining amounts to an improper delegation of legislative power. They rely primarily on the conclusory opinions of their so-called expert witnesses that collective bargaining results in the MCCFA having increased "influence" with respect to the terms and conditions of employment of community college instructors. These opinions have little factual basis. Beyond that, the appellants' equation of "influence" to "delegation" is a leap of logic which is unsupportable.

Appellants cite as authority for their position *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).[3] *Schechter*, assuming arguendo its precedential importance, is easily disposed of. In that case, the Court struck down portions of the National Industrial Recovery Act on the basis that Congress had improperly delegated legislative power to the President of the United States in violation of Article I of the United States Constitution, which prescribes the authority and duties of the Congress. 295 U.S. at 529-30. *Schechter* may or may not have something to say about the requirement of separation of powers placed upon the federal government by the Constitution.[4] It has nothing to say about how a

[3] The district court noted that the continuing vitality of these decisions is "doubtful at best." Appendix at A-6.

[4] Even appellants argue that cases involving delegation to public officers, as opposed to private persons, have no relevance to the facts at hand. Appellants' Jurisdictional Statement, 17 n. 55.

state may elect to structure its government.[5]

Carter addressed the question of delegation by Congress to private groups of certain authority to establish the hours of work and wages of coal miners. The statute in question established certain coal producing districts. If the producers of 2/3 of the coal in a district and over 1/2 of the miners employed in that district agreed through collective bargaining to a particular wage rate, then all coal producers and miners in the district were subject to that wage rate. *Carter* may be criticized and distinguished on a number of grounds. But the decision is easily disposed of in the present context by noting that in *Carter* there was a delegation to two private parties—the producers and the miners—who through agreement could enact wage rates binding on other private parties. In the present case, the public employer participates in the negotiations, and nothing becomes binding unless the public employer agrees. Such an arrangement is not a "delegation" of the kind condemned by *Carter*. Nor does *Carter* offer a scintilla of support for appellants' assertion that increased

[5] It is clear that the federal constitution does not require the states to observe in their internal organization the limitations imposed by the separation of powers doctrine, *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 552 (1908); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); 1 Cooper, *State Administrative Law* 45 (1965). It should be noted that the Minnesota Supreme Court has upheld those provisions of PELRA which require that a private arbitrator establish contractual terms and conditions in certain cases where the public employer and exclusive representative are unable to reach a negotiated agreement as against a claim that such compulsory arbitration is an unconstitutional delegation of authority. *City of Richfield v. Local No. 1215, I.A.F.F.*, 276 N.W. 2d 42 (Minn. 1979). If delegation of authority of this kind to a private arbitrator is permissible, it is clear that the Minnesota Supreme Court would find no constitutional impediment to the negotiation process, where the public employer retains the right not to agree to any proposal.

"influence" is the same as a delegation. In summary, appellants have totally failed to establish that participation in negotiations by a public employer with a properly certified exclusive representative constitutes a delegation of authority.

The lack of an unconstitutional delegation is further buttressed by the provisions of PELRA reserving to the legislature the right to accept or reject any negotiated agreement. Appellants assert that this retaining of authority is not relevant to the issue. Their agrument lacks common sense insofar as the legislature's ability to review the negotiated agreement plainly gives *it*—not the MCCFA—the last word on employment terms and conditions in the community colleges. Appellants would also ignore the decisions of this Court which establish the importance of such retained authority. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), for example, the Court upheld federal legislation setting up private industry boards in the coal industry each empowered to propose minimum prices which could be approved, modified or disapproved by a public commission. Because of the commission's final approval authority, the Court ruled: "Since law-making is not intrusted to the industry, this statutory scheme is unquestionably valid." 310 U.S. at 399. *See generally* Liebermann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L.J. 650, 667, 701-04, 718 (1975) (discussing constitutional significance of private delegates being subject to public review). Appellants have utterly failed to establish that any unconstitutional delegation exists as a result of the negotiations structure established by PELRA.

Appellants' arguments are also flatly inconsistent with positions which they have maintained throughout this litigation. Appellants have stated to the district court:

> Plaintiffs do not challenge the abstract principles of exclusive representation or fair share fees as embodied in PELRA. If MCCFA were an independent organization akin to a traditional faculty-senate, and not substantially involved in political activism Plaintiffs would not complain.

Plaintiffs' Report to the Court on the Status of the Case as of Pre-Trial Hearing of 19 November 1979, p. 12. *See also* statements to the same effect in Plaintiffs' Brief in Opposition to Defendants' Motion to Discuss, submitted March 14, 1980, at pp. 12-13, 19, 46-47. If a "traditional faculty-senate" were certified as an exclusive representative, it would enjoy the same increased "influence" about which appellants complain. Such an obvious contradiction is indicative of the specious nature of the claim forwarded by appellants.

B. Appellants' Argument that the MCCFA is Constitutionally Disqualified From Acting as an Exclusive Representative Under PELRA is Without Merit.

Appellants argue that under this Court's decisions in *Elrod v. Burns*, 427 U.S. 346 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), it is a violation of their First Amendment freedom of association rights for the MCCFA to act as an exclusive representative. Their argument is based on the factual premises that the MCCFA together with the other appellee labor organizations constitute a single integrated organization, and that this organization is the constitutional equivalent of a political party. PELRA, according to this argument, compels appellants to associate with this "political party" in violation of First Amendment rights recognized in *Elrod* and *Branti*.

After an extensive trial, the lower court refused to accept the appellants' factual premises. First, the court rejected the appellants' claim that the appellee labor organizations are a single, integrated entity. Findings of Fact, Appendix at A-38. Thus, appellants' claim of coerced association may exist only with respect to the MCCFA, not the other appellee labor organizations. As noted above, "nearly all" MCCFA activities directly relate to collective bargaining. Second, the court rejected the appellants' claim that the appellee labor organizations are the constitutional equivalent of a "political party." Appellants' proof on this issue was fundamentally flawed by the failure to distinguish between political activity related to collective bargaining, and that which is not so related. Findings of Fact, Appendix at A-44; Memorandum Opinion and Order, Appendix at A-10. This distinction is at the heart of *Abood*, which recognizes and upholds the use of agency shop fees to support the necessarily political aspects of public sector collective bargaining. 431 U.S. at 231-32. While Appellants would have this Court overturn the factual findings of the lower court, they have presented nothing in their Jurisdictional Statement which justifies such an overturning, or which excuses their accusations of impropriety on the part of the lower court. See Appellants' Jurisdictional Statement at 28-29.

Moreover, appellants' case is insufficient legally even if the appellee labor organizations were found to be an integrated political action organization.[6] Appellants do not allege that the appellee labor organizations have spent their compulsorily collected fair share fee on ideological activity unre-

[6] Appellants' assertion that the lower court "apparently accepted Appellants' legal analysis" is not based on anything found in the lower court's findings or memoranda.

lated to collective bargaining. Rather they claim they are forced to associate with the labor organizations because they are represented by the MCCFA, and are forced to pay a fee to the MCCFA (irrespective of how the fee is spent). These links do not amount to an unconstitutional "association" for First Amendment purposes.

This Court's decisions in *Abood, Hanson* and *Street* stand for the proposition that a dissenting employee may constitutionally be required to pay a fee to a politically active union, so long as that fee is not used for ideological purposes unrelated to collective bargaining. Therefore, in order to allege a constitutionally cognizable claim of compelled "association" appellants must assert that part of their fees is being used by appellee labor organizations for proscribed purposes. Appellants make no such claim. Rather than challenging the size of the fair share fee, they object instead to being represented by or paying any fee to the MCCFA. This argument is foreclosed by *Abood, Hanson* and *Street.*

Appellants' argument is unsupported by *Elrod* or *Branti. Elrod* was decided prior to and was cited by the *Abood* court. In *Elrod,* several employees of the Cook County Sheriffs Department were fired because they failed to obtain support from or affiliate with the Cook County Democratic organization. The Court specifically described the affirmative conduct required of the employees:

> In order to maintain their jobs, respondents were required to pledge their allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives.

427 U.S. at 335. Appellants are not required to pledge allegiance, work for, or obtain the sponsorship of the MCCFA. Findings of Fact, Appendix at A-49. While appellants are required to pay a fee to the MCCFA, that fee (unlike the coerced contribution in *Elrod*) is not used for ideological activity unrelated to collective bargaining. *Elrod* does nothing to assist the appellants in avoiding the clear holding of *Abood*, *Hanson* and *Street*: a politically active union may collect a fair share fee, so long as the dissenters' money is not used for proscribed purposes. Appellants' claim is legally insufficient.

CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment of the lower court should be affirmed.

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